



July 16, 1999

Mr. William P. Chesser
City Attorney
City of Brownwood
P.O. Box 1389
Brownwood, Texas 76804

OR99-1993

Dear Mr. Chesser:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125709.

The City of Brownwood (the "city") received a request for the following information:

1. All information that the Office of Personnel is responsible for from October 1, 1997 up to and including March 31, 1999 in any way relating to corrections to any city employee compensation and/or benefits included or noted in payroll records;
2. All information recently released to Mr. William W. Bell in accordance with his open records request regarding employee Kay Serrano along with the opinion request letter to the Attorney General;
3. Copies of Kay Serrano's individual employee payroll time cards submitted for compensation from October 1, 1998 up to and including the last pay period of March, 1999;
4. Copies of documents used by payroll officers to create or change information in the payroll records of individual employees (excluding tax deduction forms) for the period October, 1997 through January, 1999;
5. Copies of records created to control and monitor the issuance of keys in City Hall;
6. Copies of reports, studies, aggregated or summarized data, and similar documentation compiled to demonstrate compliance with the Equal Pay Act for FY 1998-99;
7. Copies of all employee grievance records relating to Kay Serrano.

You have released documents responsive to item 2. You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code and

common-law privacy as encompassed by section 552.101 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert that you do not collect, assemble, or maintain information responsive to items 1 and 4. Generally, the Public Information Act does not require a governmental body to make available information which does not exist. Open Records Decision No. 362 (1983). You state that you do not have the information in electronic form. However, you further state:

To locate records pertaining to payroll "corrections" would required [sic] the City to go through each employee of the City's personnel file, of which there are more than 200 such files, to locate "corrections" to the payroll records. Quite simply, the City does not collect, assemble or maintain such information which would allow it to efficiently produce such information. [Citation omitted.]

Based on your representation, it appears that the city does maintain information responsive to the request. A governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 at 8 (1990). The fact that it may be burdensome to provide the information at issue does not relieve a governmental body of its responsibility to comply with the Public Information Act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (1976), *cert. denied*, 430 U.S. 931 (1977) (cost or difficulty in complying with act does not determine availability of information); Open Records Decision No. 497 (1988). Thus, you must provide the requestor with the responsive information unless it is confidential by law. Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.-Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the city must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue

the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). The fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983).

You explain that the requestor has alleged and notified the city council that a city employee has engaged in numerous acts of civil and criminal wrongdoing. Shortly thereafter, on March 10, 1999, the city received notification that the requestor is represented by an attorney. On April 6, 1999, the requestor informed the city that she does not “intend to let the District Attorney’s investigation of criminal allegations against Kay Serrano encroach on the statute of limitations imposed on other options I am considering. I believe that I have grounds for investigation by the Equal Employment Opportunity Commission as well as a complaint for lack of responsible actions regarding ‘slander.’”

After reviewing your arguments and the totality of the circumstances, we conclude that the city reasonably anticipates litigation. Additionally, you have shown that a portion of the requested information relates to the slander claim. However, that portion of the requested information was obtained from the opposing party. When the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). As for the remaining submitted information, you have not shown how the information relates to the reasonably anticipated litigation. Therefore, you may not withhold any of the requested information under section 552.103.

Next, we address the common-law privacy claim of the city employee who is the subject of the information. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 also encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public under common-law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Records Decision No. 611 at 1 (1992). Most of the requested information concerns the conduct of a public employee at work; therefore, there is a legitimate public interest in the information. Accordingly, most of the submitted information is not protected from disclosure under common-law privacy and must be released. We have marked three documents that are private because they concern personal financial information. Open Records Decision Nos. 600 at 10 (1992), 545 (1990).

Lastly, the city employee whose records are at issue states that portions of the information are untrue and extremely slanderous.² This suggests that she believes that some of the information may be excepted from disclosure under the "false light" privacy doctrine. This office has held that "false light" privacy is not a proper consideration under the Public Information Act. Open Records Decision No. 579 (1990). Additionally, in *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994), the Texas Supreme Court concluded that Texas does not recognize the tort of "false light" invasion of privacy. Therefore, the city may not withhold the requested information under the doctrine of "false light" privacy.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 125709

Encl.: Submitted documents

cc: Ms. Connie Mitchell
City of Brownwood
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(w/o enclosures)

²This office cannot resolve questions of fact. Open Records Decision No. 554 (1990).